

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2008-0354-PR
)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
KRISTOFER ROBIN BELL,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20042254

Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF DENIED

Robert J. Hirsh, Pima County Public Defender
By David J. Euchner

Tucson
Attorneys for Petitioner

ESPINOSA, Judge.

¶1 After a jury trial, petitioner Kristofer Robin Bell was convicted of two counts of robbery and one count of theft by control. The trial court sentenced him to concurrent, enhanced, presumptive terms of imprisonment, the longest for 11.25 years. This court

affirmed the convictions and sentences on appeal. *State v. Bell*, No. 2 CA-CR 2005-0004 (memorandum decision filed May 18, 2006). While Bell's appeal was pending, he filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The trial court dismissed the notice based on its belief that it lacked jurisdiction of the post-conviction proceeding because the notice of post-conviction relief was filed after the notice of appeal. On review, we agreed with Bell that, while his appeal was pending and before this court issued its mandate on December 6, 2006, the trial court had jurisdiction to hear the post-conviction proceeding. *State v. Bell*, No. 2 CA-CR 2006-0395-PR, ¶ 3 (memorandum decision filed Mar. 8, 2007). Bell then filed a petition for post-conviction relief in which he asserted that trial counsel had been ineffective. The trial court denied relief, and this petition for review followed.

¶2 We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). To be entitled to relief based on the ineffectiveness of counsel, a defendant must establish that counsel's performance was deficient, based on prevailing professional norms, and that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). To demonstrate prejudice, the defendant must establish "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Strickland, 466 U.S. at 694. Nor has Bell raised a colorable claim for relief, which would entitle him to an evidentiary hearing. A colorable claim is “one that, if . . . true, might have changed the outcome.” *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

¶3 In his petition for post-conviction relief, Bell alleged three instances of ineffective assistance. First, he claimed counsel had failed to object when a police detective testified that Bell was the person depicted in two surveillance photographs taken at the banks that had been robbed. Bell contended counsel also should have objected when the detective testified that a shirt, found in a car that was abandoned when its occupants fled from a police officer, looked like the shirt “Bell [had] used in the robbery.” The officer had stopped the car because its license plate matched the one a witness had given for a car that had been associated with one of the bank robberies. Bell argued in his Rule 32 petition that the detective’s testimony was improper opinion testimony that invaded the province of the jury. *See Ariz. R. Evid.* 704.

¶4 Next, Bell asserted that counsel had been ineffective by failing to move to strike the jury panel. Bell maintained that at least two jurors had heard an inappropriate comment that another prospective juror had made about Bell during the lunch break; the comment was that it should not take long to find him guilty because he looked guilty based on his haircut. Bell contended in his petition that at least two other potential jurors, and perhaps more, had heard the comment. The trial court struck for cause the panel member who had made the comment; the other two assured the court they could be fair and would not

be affected by the comment of the stricken juror. Additionally, the other two jurors were subsequently stricken in the final selection process and did not serve on the jury. But Bell contended in his Rule 32 petition that counsel should have asked the court to strike the entire panel. Because counsel did not do so, Bell argued, his case was “tried by a jury that included individuals who were predisposed to convict,” and the “presumption of innocence was contaminated.”

¶5 Bell’s last allegation was that counsel had performed deficiently by failing to object when, on three occasions, the trial court allowed the jury to hear information that suggested Bell had been involved in and charged with a third robbery. The trial court denied relief; on review, Bell essentially reiterates the claims of ineffective assistance of trial counsel that he raised below.

¶6 In its minute entry denying relief, the trial court first reviewed the relevant history of this case. Next, the court articulated correctly the law applicable to claims of ineffective assistance of counsel. The court then clearly identified and addressed each of the three instances in which Bell alleged counsel’s performance had been deficient and analyzed whether Bell had established prejudice from the purportedly deficient performance to warrant the relief he requested.

¶7 The record supports the trial court’s conclusion that, even assuming counsel’s performance were deficient, Bell has failed to establish a reasonable likelihood the outcome of the trial would have been different, but for that deficiency. Thus, Bell has not raised a

colorable claim entitling him to an evidentiary hearing. Moreover, no purpose would be served by rehashing here the trial court's order on this prerequisite. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Rather, because the order is correct and Bell has not sustained his burden on review of establishing otherwise, we adopt the trial court's ruling. *Id.*

¶8 We grant Bell's petition for review, but finding no abuse of discretion by the trial court, we deny relief.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOHN PELANDER, Chief Judge

JOSEPH W. HOWARD, Presiding Judge